ASBESTOS LITIGATION IN THE UNITED STATES: A BRIEF OVERVIEW

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PREFACE

This Paper is an edited transcript of written testimony delivered in October 1991 by Deborah R. Hensler to the Courts and Judicial Administration Subcommittee, United States House Judiciary Committee.

The author summarizes the scope of asbestos litigation in the United States, the response of the civil justice system to date, and the obstacles to efficient and equitable resolution of asbestos-related personal injury claims.
Mr. Chairman and Members of the Judiciary Committee: My name is Deborah Hensler. I am a senior social scientist at The Institute for Civil Justice, at RAND, and a visiting professor at the University of Southern California Law Center. The Institute has been an important source of empirical research on mass toxic torts and on asbestos litigation in particular. Its research is supported by pooled grants from corporations, private foundations, the government, trade and professional associations, and individuals.

The purpose of my testimony is to provide a brief overview of the status of asbestos litigation in the United States today, and to identify the obstacles to efficient and equitable resolution of current and future asbestos-related personal injury claims. I believe that asbestos litigation poses an important challenge to the civil justice system, one which the system so far has failed to meet, despite the extensive efforts of many federal and state judges, parties and attorneys. I believe that a national solution to the asbestos litigation problem would be preferable to the current piecemeal efforts to deal with the litigation. I also believe that there are a variety of strategies for achieving such a national solution, each offering a different mix of costs and benefits. Assessing these costs and benefits and determining the best strategy requires a deep understanding of the history and dynamics of asbestos litigation to date.

My testimony will address three topics:

- The scope of asbestos litigation in the United States.
The response of the civil justice system to date.

The obstacles to efficient and equitable resolution of asbestos-related personal injury claims.

As will become apparent, empirical sources on asbestos litigation are incomplete, and available data are sometimes difficult to interpret. My analyses of recent data have been constrained by the limited time that I have had to prepare this testimony since receiving the invitation to appear before you. Should the committee deem it helpful, I would be happy to submit a more extensive report to you at some future date.

Finally, I note that the views and conclusions expressed here are my own and should not be interpreted as representing either of my employers, The Institute for Civil Justice, or any of the Institute's research sponsors.

THE SCOPE OF ASBESTOS LITIGATION IN THE UNITED STATES

No one knows for sure how many asbestos-related personal injury claims are now pending nationwide. According to the most recent estimates, there are approximately 31,000 asbestos-related products liability suits pending in the federal district courts.¹ Knowledgeable observers estimate that the state court caseload is approximately twice the size of the federal district caseload,² implying a total of about 90,000 suits pending nationwide. In addition, some claims are brought against defendants without suit. In February 1991, Forbes magazine estimated that there were 115,000 asbestos personal-injury claims pending nationwide, including federal and state suits and claims brought without lawsuits.³

¹In Re Asbestos Products Liability Litigation (No. VI), Judicial Panel on Multidistrict Litigation, July 29, 1991, at 1, Fn. 2.
No one knows the full value of this pending caseload, and estimating that value is a complicated task requiring myriad assumptions about the composition of the caseload, current claims valuation practices, and defendants' financial status and litigation posture. Mark Peterson, the court-appointed expert for the recent Manville reorganization proceedings, has estimated the total value of all pending claims at between $8 billion and $14 billion, not including transaction costs. This estimate assumes that pending claims would be paid off for amounts similar to amounts paid in the past -- a controversial assumption -- and is subject to other sources of uncertainty.4

At least as significant as the sheer number and value of pending claims has been their rate of growth and their increasing impact on the civil justice system. In the initial phase of asbestos litigation, prior to 1980, about 950 asbestos cases were filed in the federal district courts.5 In the early 1980s, filings increased dramatically. From 1980 through 1984, approximately 10,000 cases were filed -- about a ten-fold increase over the preceding five-year period.6 In the subsequent five years (1985 - 1989), the number of filings again increased sharply, totalling about 37,000 cases, a four-fold increase over the preceding five-year period. In 1990, the total annual filings topped 13,000 -- more than the total number of cases filed from 1980 to 1984 and about one-third the number filed in the five-year period 1985-1989.7

Because there is no registry of asbestos actions in state courts, we cannot compute analogous growth rates for the state court system. But data from the Manville Personal Injury Trust, which include federal

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4In Re Joint Eastern and Southern District Asbestos Litigation, Memorandum and Final Order, Civil Class Action No. 90-3973, Appendix C.
6T. Dungworth, supra, at 36.
7RAND staff computations based on the Federal Statistical Data Base.
and state suits and non-suit claims against the Trust, also reflect dramatic filings growth: At the time Manville sought Chapter 11 protection, there were approximately 17,000 claims pending against the Manville Corporation. In the subsequent five years, while suits against Manville were stayed during the pendency of the reorganization, another 59,000 claims were filed. Following the consummation of the Trust, more than 90,000 additional claims were filed, bringing the total filings against the Trust to about 170,000 by February 1991.8 The total number of claims filed against the Manville Personal Injury Trust to date is more than ten times the number pending at the time Manville first sought Chapter 11 protection. It is about two and one-half times the number of claims pending when the Trust agreement was consummated six years later, and about twice the highest estimate considered during the first reorganization proceedings of the ultimate number of claims that would be brought against the Trust.

As the number of claims have grown, their effect has been felt throughout the civil justice system. In the early years of the litigation, cases were concentrated in 17 jurisdictions, including five federal districts whose cumulative caseloads had reached more than 1000 claims apiece by 1984.9 By 1991, almost every federal district (87 of 94) had some asbestos cases pending; more than half of these had 50 or more. Twenty courts had at least 250 cases pending and five districts had pending caseloads of 1000 or more.10 In the period 1986–1991, eight districts had new filings of more than 1000 apiece; in the Northern District of Ohio alone, new filings topped 10,000.11

8 In Re Joint Eastern and Southern District Asbestos Litigation, supra, at 81. Additional filings data from preliminary tabulations prepared by the Manville Personal Injury Trust.
9 D. Hensler, supra, at 8, 26.
10 In Re Asbestos Products Liability Litigation, supra, Summary of Schedule A, Docket No. 875. The size of pending caseloads reflects both the rate of filings and the rate of dispositions: A district with a large pending caseload may have had a particularly large number of filings, or may be particularly slow in disposing of asbestos cases, or both.
11 RAND staff tabulations, from the Federal Statistical Data Base.
The impact of the litigation on the private sector has also grown over time. By 1982, at the time of the Manville bankruptcy, more than 300 different defendants had been named on asbestos products liability suits. About 16 corporations had been named on 8,000 claims or more. Three corporations had sought Chapter 11 protection. By 1986, close to 500 corporations had been named as lead defendants in federal asbestos cases. By 1991, there were two dozen major asbestos defendants, each of which had 20,000 or more cases pending against them in federal court, and a number of which had 75,000 claims or more pending against them in state and federal courts combined. To date, twelve corporate defendants have sought the protection of Chapter 11.

It is tempting to attribute the growth in asbestos litigation to perverse incentives produced by various aspects of the civil justice system. But it is important for policymakers considering reforms in the asbestos litigation process to place this growth in context. During the period 1935-1965, industrial use of asbestos worldwide grew dramatically. During this period, millions of Americans were exposed to asbestos, within and outside of the workplace. New use of asbestos was not eliminated in the United States until 1975. Some experts estimate that one-half million deaths and many more illnesses will ultimately result from this exposure. With latency periods for asbestos-related illnesses ranging from 15 to 40 years, we may actually be just entering the peak period of disease, which may last for another 20 years or more.

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12 J. Kakalik et al., Costs of Asbestos Litigation, RAND Institute for Civil Justice, R-3042-ICJ, Santa Monica, Ca., 1983, at 12.
13 T. Dungworth, supra, at 26. Because it excludes other-than-lead defendants and does not include defendants named on state suits, this number underestimates the total number of corporations involved in asbestos litigation at the time.
14 In Re Asbestos Product Liability Litigation, supra, at 2.
15 S. Oliver and L. Spencer, supra.
16 In Re Joint Eastern and Southern District Asbestos Litigation, supra, at 52.
17 For a summary of the history of asbestos use and epidemiological research on asbestos-related disease, see In Re Joint Eastern and Southern District Asbestos Litigation, supra, at 19-40.
Estimates of the ultimate health results of asbestos exposure are highly controversial, as are assessments of the extent of disease reflected in the current litigation caseload. Nonetheless, I believe it is wrong to see the current asbestos problem simply as a litigation crisis created by lawyers or by inadequacies in our civil law. At its core, the asbestos litigation problem is a public health catastrophe, which is itself the legacy of decades of judgments of public and private decisionmakers who failed to contain or regulate the use of asbestos in the workplace.

THE RESPONSE OF THE CIVIL JUSTICE SYSTEM TO DATE

Few participants in the asbestos litigation process believe that the civil justice system has coped well with the challenges posed by asbestos worker-injury claims. As many have noted, the history of asbestos litigation can be characterized as an attempt to fit a "square peg into a round hole."

In the early years of the litigation, many jurisdictions imposed statutes of limitation that ignored the realities of latent injuries. As a result, in some parts of the country injured workers had no recourse to the courts, while in other states workers with identical injury experiences were able to obtain substantial compensation. Among those jurisdictions where cases could be brought, differences in rulings with regard to apportionment of damages, admissibility of key evidence, availability of punitive damages and other substantive aspects of asbestos litigation resulted in similarly situated plaintiffs obtaining very different compensation awards.\(^\text{16}\) Variations in interpretation of statutes of limitation and other substantive rules also contributed to forum shopping and helped to create the national asbestos litigation bar.

As filings mounted in federal and state courts, many trial judges and attorneys recognized that they could not deal with asbestos cases in the "case at a time" fashion prescribed under the idealized regime of

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\(^\text{16}\)D. Hensler et al., supra, at 37-47, 66-67.
individualized justice.\textsuperscript{19} Most courts with heavy asbestos caseloads devised new procedures which were successful in streamlining pretrial management of the cases. However, these innovative pretrial procedures did not significantly increase the speed or decrease the cost of resolving the claims.\textsuperscript{20} By the early 1980s, some trial court judges and attorneys had called for the application to asbestos litigation of formal techniques for aggregating civil claims, such as multidistricting, class actions, and issue preclusion. But for many years such actions were forestalled by the Judicial Panel on Multidistricting and by appellate courts on the grounds that the techniques were not appropriate for tort claims with diverse fact situations.\textsuperscript{21} It was only in the late 1980s that some appellate courts approved the use of some of these procedures for asbestos cases,\textsuperscript{22} and only this past year that the Judicial Panel on Multidistricting ordered the transfer of all federal asbestos cases to a single federal district court.\textsuperscript{23} In the face of appellate disapproval of formal aggregative techniques, judges and attorneys in many jurisdictions developed informal techniques for collective settlements.\textsuperscript{24}

Over the past half-dozen years, there has probably been more procedural innovation associated with asbestos litigation in federal and


\textsuperscript{20}For an explanation of why pretrial practices did not translate automatically into speedy dispositions, see D. Hensler et al., \textit{supra}, at 68-82.

\textsuperscript{21}D. Hensler et al., \textit{supra}, at 52-66. While some attorneys supported these efforts, others remain strongly opposed to them.


\textsuperscript{23}In \textit{Re Asbestos Products Liability Litigation, supra},. In principle, the cases were transferred solely for the purpose of pretrial management, consistent with current multidistricting rules. However, it is clear that the supporters of multidistricting hope that this action will lead to resolution of the claims.

\textsuperscript{24}While informal aggregation can expedite resolution, some informal practices raise important equity issues. For a discussion of these issues, see D. Hensler et al., \textit{supra}, at 95-97.
state courts than in any other single area of litigation. Courts have certified asbestos class actions, consolidated asbestos cases for trial, and bifurcated, trifurcated and reverse bifurcated issues in both individual and consolidated trials. Courts and parties have developed and implemented court-based and private alternative dispute resolution procedures. Courts have mandated extensive data collection efforts to support settlement efforts, and have experimented with computer-based models for assessing damages. State and federal court judges have joined together to manage caseloads in particular locales.\textsuperscript{25} The fact that so many claims have been resolved to date is a tribute to these efforts. But these efforts have failed to expedite a substantial fraction of the caseload. Nor do they appear to have brought about significant reductions in transaction costs.

As courts struggled to deal with their regular caseloads, a significant number of defendants sought Chapter 11 protection. Cases against the bankrupt defendants were stayed during reorganization proceedings. Initially, the bankruptcy actions threw the litigation against other nonbankrupt defendants into a turmoil and caused significant delays in resolving claims against them. But eventually that litigation moved forward. Meanwhile, the bankruptcies resulted in long delays in resolving claims against the bankrupts: The 17,000 or so claims pending against Manville in 1982 were not paid by the Manville Trust until after consummation of the reorganization agreement in late 1988. Eighteen months later, claims resolution halted again, when Judge Jack Weinstein entered a stay of payments pending a revision of the Trust agreement.\textsuperscript{26} The experience with regard to other bankruptcies has apparently not been much more successful.


\textsuperscript{26}\textit{In Re Eastern and Southern District Asbestos Litigation, supra,} at 94.
The tortuous process of claims resolution is reflected in court statistics on time to disposition and in the transactions costs borne by parties to the litigation. For all federal court asbestos cases disposed from 1986 through 1990, the median time to disposition was two years. But 39 percent of cases took more than three years to reach disposition, 12 percent of cases took more than five years to reach disposition and 5 percent of cases took more than seven years to reach disposition.\textsuperscript{27} In contrast, in 1986, the median time to disposition for all federal tort cases was about a year, and only 9 percent of these cases took more than three years to reach disposition.\textsuperscript{28} There are no systematic data on median time to disposition for state court asbestos cases. But RAND's study of asbestos case processing during the early 1980s found that, among courts with heavy caseloads, state courts were generally less successful than federal courts in processing cases expeditiously.\textsuperscript{29}

Lengthy times to disposition in asbestos cases are not attributable to high trial rates: From 1986 to 1990, 264 asbestos cases reached trial verdict in the federal courts, representing one percent of all federal asbestos dispositions during that period.\textsuperscript{30} Rather, lengthy disposition times appear to be a function of the complexity of the litigation and the high financial stakes associated with it, as discussed further below.

\textsuperscript{27} Computations performed by RAND staff, from the Federal Statistical Data Base. Eight federal courts had median times to disposition for asbestos cases of more than three years, 5 courts had median times to disposition of more than four years, and 1 court had a median time to disposition of more than five years.

\textsuperscript{28} T. Dungworth, Statistical Overview of Civil Litigation in the Federal Courts, RAND Institute for Civil Justice, R-3585-ICJ, Santa Monica, Ca., 1990, at 23.

\textsuperscript{29} P. Hensler et al., supra, at 85.

\textsuperscript{30} Comparable state data are not available. In a study of asbestos claims resolved prior to the 1982 Manville bankruptcy, RAND found that the trial rate in federal courts was slightly higher than the trial rate in state courts. See J. Kakalik et al., Variation in Asbestos Litigation Compensation and Expenses, RAND Institute for Civil Justice, R-3132-ICJ, Santa Monica, Ca., 1984 at 40.
The high transactions costs of the tort liability system are well-known: In the aggregate, about 50 percent of monies paid to resolve tort lawsuits are spent on legal fees and other litigation costs.\textsuperscript{31} The most extensive study of transactions costs in asbestos litigation was conducted by RAND in 1984. Using data for claims resolved prior to the 1982 Manville Bankruptcy, RAND found that 61 percent of monies paid to resolve asbestos claims were spent on legal fees and expenses. About 40 percent of transactions costs were associated with plaintiff lawyer fees and expenses, and about 60 percent with defense fees and expenses.\textsuperscript{32} The RAND study has not been updated, but the 61 percent transaction cost ratio is still widely cited as an accurate estimate of transaction costs in asbestos litigation.\textsuperscript{33}

**OBSTACLES TO EFFICIENT AND EQUITABLE RESOLUTION OF ASBESTOS CLAIMS**

Why has asbestos litigation proved so intractable for the civil justice system? After all, while the numbers of cases involved are substantial, they are but a small fraction of the total number of civil suits filed annually in the United States.\textsuperscript{34} A 1986 There are a myriad of explanations for the current asbestos litigation situation. However, seven factors stand out:

\textsuperscript{31}J. Kakalik and N. Pace, *Costs and Compensation Paid in Tort Litigation*, RAND Institute for Civil Justice, R-3391-ICJ, Santa Monica, Ca., 1986, at 74.

\textsuperscript{32}J. Kakalik et al., *supra*, at xviii.

\textsuperscript{33}In his final order and memorandum on the reorganization of the Manville Trust, Judge Weinstein cited the RAND estimate and then went on to say: "Based on information now available, including overheads, insurance costs and expenditures for courts, the percentage available to plaintiffs is probably closer to 30 cents for every dollar expended." *In Re Joint Eastern and Southern Asbestos Litigation*, *supra*, at 59. However, no supporting documentation for this figure is provided.

\textsuperscript{34}A recent report of the President’s Council on Competitiveness estimated that a total of 17 million civil suits are filed annually. But that number includes many actions other than tort liability suits. RAND study estimated the total number of tort suits filed in general jurisdiction trial courts at about 1 million. See J. Kakalik and N. Pace, *supra*, at 14.
- 11 -

- The character of individual asbestos personal injury claims.
- The scale of the litigation.
- The concentration of litigation against a small number of major defendants and (initially) within a small number of jurisdictions.
- The changing nature of the asbestos caseload.
- The impact of the bankruptcies.
- The effect of the concatenation of litigation events on the ongoing litigation process.
- Uncertainty about the status of claims, parties, and the law.

Asbestos cases are not ordinary suits. They involve allegations of serious and diverse injuries, some of which are particularly associated with asbestos exposure (e.g. mesothelioma) and others of which (e.g. lung cancer) have multiple possible causes, and all of which require expert testimony to prove. Asbestos-related diseases are progressive, and the prognosis in individual cases may be highly uncertain. The latency of asbestos disease makes causation difficult to prove in individual cases, and because the typical claimant was exposed to multiple asbestos products, it may also be difficult to demonstrate the nexus between a defendant and the source of exposure. Taken together, these characteristics of the claims suggest that asbestos lawsuits would be unusually difficult to resolve, even if there were fewer of them.

The scale of the litigation was clearly another factor in producing the asbestos litigation "mess." But scale alone was not the source of problems: Rather, it is the concentration of so many cases against particular defendants and in particular jurisdictions that was the initial source of problems. For major defendants, even the prospect of modest payments to so many claimants could spell disaster.\(^{35}\) For those defendants that avoided bankruptcy, the concentration of cases created

\(^{35}\)For example, in its petition for bankruptcy, Eagle-Picher said that it had spent $540 million in the preceding five years to settle about 45,000 claims, an average of $12,000 per claim. See B. Feder, "Bankruptcy Is Sought By Eagle," New York Times, January 8, 1991.
cash flow problems that constrained settlement and contributed to the lengthy disposition times cited above. Concentration of cases against defendants also led to concentration of cases in a small number of defense firms, which placed further constraints on settlement rates.\textsuperscript{36}

Concentration of cases within a small number of jurisdictions -- in a system in which resource allocation is a relatively inflexible process -- meant that rather limited resources were brought to bear on the caseload. Concentration probably also slowed the recognition by the judiciary that it had a crisis on its hands and made it more difficult to overcome appellate courts' objections to procedural innovation. Jurisdictional concentration initially also contributed to concentration of claims in a very small number of plaintiff attorney firms, which in turn complicated the settlement process and created incentives for plaintiff attorneys to actively search for new cases.

Another factor contributing to intractability, which has assumed greater importance in the past couple of years, is the changing nature of the caseload. The best available data on the changing composition of the asbestos caseload come from the Manville Personal Injury Trust. It is important to note that these data may not be representative of the total universe of personal injury claims. Analyses of these data by Trust personnel show that the composition of the Trust's caseload has changed considerably over the past decade, both with regard to nature of injury and source of exposure. Table 1 summarizes the injury data for the claims pending at the time of Manville's bankruptcy, the period during the reorganization, and the period since consummation. As the number of claims against the Trust increased, the proportion of mesothelioma and lung cancer cases decreased slightly, the proportion of asbestosis cases decreased somewhat more and the proportion of pleural cases and cases of unknown injury or no current injury tripled. During the same period, there was a more dramatic change in the mix of cases by nature of exposure. Of the claims pending at the time of the bankruptcy, more than 40 percent of the cases were associated with

\textsuperscript{36}D. Hensler et al., supra, at 86-94.
Table 1
ALLEGED INJURY, CLAIMS FILED AGAINST THE MANVILLE TRUST [a]

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<tr>
<td>Lung Cancer</td>
<td>7</td>
<td>6</td>
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Notes:  
[a] Calculations by RAND staff, based on preliminary tabulations by Trust personnel, from proof of claim forms provided by plaintiff counsel. Additional analyses indicate a high level of agreement between alleged injuries and injury evaluations by Trust personnel.  

shipyard workers. The next largest single category of exposure was insulation workers (about 8%) and the third largest category was asbestos producers (about 7%). In the period following consummation of the Trust agreement, these three categories -- sometimes referred to as the "traditional" cases -- accounted for only one-quarter of new filings. Another quarter of cases were associated with maritime workers (11%), iron workers (8%), and tire workers (6%). At least a dozen different sorts of exposure are significantly represented in the current pending Trust caseload.

The changes in injury distribution, coupled with the rapid and unanticipated increase in the number of claims, complicate estimation of the ultimate liability the Trust -- and other defendants -- will face, since damages paid vary substantially by type of injury.\textsuperscript{37} The changes

\textsuperscript{37}For alternative calculations of the ultimate total cost of
in exposure distribution raise additional problems of estimation, because the strength of causation evidence varies by type of exposure, and estimates of the likelihood that a jury would find liability if a case went to trial influence negotiated settlement values. Moreover, certain agreements among defendants with regard to sharing transaction costs and with regard to liability shares depend upon a particular mix of exposures. As the composition of the caseload changes, the attractiveness and fairness of any given arrangement to a particular defendant may also change. Changes in caseload composition have also been associated with the entry of new plaintiff firms into the litigation, which in turn has led to tensions within the plaintiffs bar. Together, these sources of divisiveness have made it more difficult for management-oriented courts to successfully apply standard tools for managing complex litigation, and more difficult for attorneys and parties to develop and maintain the sorts of standard operating procedures that more typically emerge in high volume, ongoing litigation.

Each bankruptcy has further complicated the process, as cases are stayed against the bankrupts and the configuration of remaining defendants shifts yet again. And, with the passage of time, defendants' insurance coverage runs out, and the configuration of parties on the defense side changes yet again, as does the financial stance -- and litigation posture -- of each remaining defendant.

Changes in the distribution of exposure have also contributed to the widening impact of asbestos litigation on the civil justice system and the economy, as more courts and more defendants are pulled into the process.

As a consequence of all of these changes -- in the nature of the caseload, the number and character of plaintiff attorney firms, the number and character of defense attorney firms, the financial status and litigation posture of each defendant, the locale of the litigation, and

asbestos personal injury claims showing the effect of type of injury, See In Re Joint Eastern and Southern District Asbestos Litigation, App. C.
the substantive and procedural legal rules -- asbestos litigation has failed to follow the trajectory of a "maturing mass tort." Indeed, the history of asbestos litigation is more a story of unravelling than a story of maturation. Each new development creates new problems, raises new issues, draws new principals into the process. The threat of bankruptcies causes a race to the courthouse, which increases pressures on the remaining non-bankrupt defendants and creates incentives for plaintiffs to seek new targets for their claims. The trusts that emerge from bankruptcy litigation become the target of non-bankrupt defendants who do not want to be left solely responsible for compensation payments. Thus, efforts to create alternative dispute resolution mechanisms are overwhelmed and defeated by the dynamics of the litigation. Moreover, the entire process is taking place within a fog of uncertainty -- about how many claims will ultimately appear, for what injuries, and with regard to what types of exposure, and about who will be left to sue and in what fora under what rules the story will finally be played out.

CONCLUSION

Devising an equitable and efficient national solution to the asbestos litigation problem will not be easy nor will it be inexpensive. An acceptable solution will have to demonstrate sensitivity to the past history of asbestos litigation, cope with the current crush of claims and include a strategy for responding to future claims. Most significantly, the success of any solution will depend on a realistic assessment of the number and type of future asbestos-related claims, an assessment that has so far eluded all participants in the asbestos litigation process. Whatever form the solution takes, it will have to introduce certainty -- for parties on both sides -- into a highly uncertain situation. I believe it is time for policymakers to take up the challenge of finding a national solution to the asbestos problem.

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